Supreme Court, U.S.
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No. 02-390

In the

Supreme Court of the United States

OVALEE BAREFOOT, ET AL.,

Petitioners,

v.

CITY OF WILMINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioners

The Petitioners are:

OVALEE BAREFOOT; GEORGE WRAGE; NICHOLAS FOKAKIS; SHARON ALLEN; ALGERNON L. BUTLER, JR.; SUSAN D. BUTLER; JOHN E. BRYANT; SHERRY W. BRYANT; WILLIAM A. HURST; LILLIAN W. HURST; MILES C. HIGGINS; MARGARET G.W. HIGGINS; MILES C. HIGGINS, III; COLLEEN M. HIGGINS; JOHN R. HICKS; CAROLYN T. HICKS; ALBERT E. WILLARD; ELIZABETH W. WILLARD; MARTIN S. WILLARD; GABRIELLE H. WILLARD; SALLY H. REARDON; WILLIAM M. WILLARD; THOMAS L. JOYCE; SUZANNE S. JOYCE; JOHN J. ORMOND; DAVID L. ORMOND; MARY C. ORMOND; CLAUDE H. McALLISTER, JR.; NANCY H. MCALLISTER; KEVIN S. SCULLY; MADELINE M. SCULLY; HARRIETT RIEMAN; JACK A. ALFORD; JULIAN H. BRADBERRY, JR.; MARY A. BRADBERRY; VANDER M. CLEMMONS; MURRAY J. DEGNAN; GLORIA R. DEGNAN; GEORGE DITCHEOS; BARBARA DITCHEOS; RONALD L. DOWNING; BARBARA J. DOWNING; HENRY P. DOZIER; FRANCES M. DOZIER; GARY D. GALLOWAY; JENNIE GALLOWAY; GREGORY V. GIAMMALVO; GLORIA J. GIAMMALVO; WILLIAM B. HAVERTY; EDNA B. HAVERTY; CHARLES E. HORTON; FLOYD P. KIRBY; LINDA N. KIRBY; CLIFF C. MABRY, JR.; MARTY MABRY; C. ROY

MALLOTT; RICHARD H. MARSTON, JR.; JOAN P. MARSTON; HUGH A. McEACHERN, JR.; MARY L. McEACHERN; JOHN V. METTS; SUSAN METTS; BESSIE G. PENNINGTON; KARL O. PIERCE; JUDY PIERCE; JOEL T. PINER; H. VAN REID; DOROTHY B. REID; JAMES W. ROUSE, JR.; JANIS M. ROUSE; PHILLIP A. SCARRELL; MONA R. SMALLEY; KENNETH SMITH; PAULA SMITH; EDWIN E. SPENCER; MONICA R. SPENCER; HOWARD J. TALLEY; BETSY TALLEY; RICHARD L. WOODBURY; SUZANNE M. WOODBURY; BARBARA D'EMELIO; HERCHEL E. ROGERS; JULIA P. ROGERS; JOHN C. BYRNES, III; MARGARET J. BYRNES; ROBERT E. DOYLE; JAMES RAYBURN; SARAH RAYBURN; CATHERINE C. TAMISIEA; DANIEL J. FILOMENA; CATHERINE FILOMENA; KIRK A. HOWARD; BARBARA A. HOWARD; J. DON BULLARD; FAYDENE S. CORBETT.

Based on the pleadings, the Petitioners are individuals residing in New Hanover County, North Carolina and owning real and personal property in the area annexed by the City of Wilmington.

Respondents

The Respondents are the CITY OF WILMINGTON and the STATE OF NORTH CAROLINA. The City of Wilmington is a municipal corporation organized under the laws of the State of North Carolina for the government of the people within its jurisdiction. No publicly held company holds any interest in either of the Respondents.

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE FOURTH CIRCUIT'S DECISION ON THE RIGHT TO VOTE CLAIM DOES NOT CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT AND IS CORRECT.

The Petitioners contend that the Fourth Circuit's decision conflicts with this Court's decisions in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), Kramer v. Union Free School District, 395 U.S. 621 (1969) and Hill v. Stone, 421 U.S. 289 (1975). All of these cases, however, involved an election, where there was some burden or limitation placed on a group's right to participate in the election. Since there was no vote on the City of Wilmington's ("City") annexation here, these cases have no application. As this Court said in Kramer,

> States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters . . . . However, 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' [Citing Harper v. Virginia Bd. of Elections]

395 U.S. at 629.

It is only when the franchise is granted in a particular election that strict scrutiny applies to any

classification of voters. This Court has limited the application of the voting cases cited by the Petitioners to situations where individuals otherwise have the right to vote based on residency. Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 68 (1978). These cases merely stand for the proposition that "where the state [has] agreed to have important municipal issues made by voters, the equal protection clause must be applied to all within the jurisdiction whose rights are affected." [emphasis added] Carlyn v. City of Akron, 726 F. 2d 287, 289 (6th Cir. 1984). These cases have not been applied to require state-wide uniformity on the local issues presented to local voters.

"In this case, no one has been given the right to vote on the annexation proposed by the City of Wilmington." Barefoot v. City of Wilmington, Pet., App. A at 13a. The statutory basis for the City's annexation does not provide a right to vote. N.C. Gen. Stat. §160A-49 (2001), Pet., App. C at 82a. Therefore, there are no restrictions or limitations on the Petitioners' exercise of their franchise. There is no constitutional right to vote on annexation. Hunter v. Pittsburgh, 207 U.S. 161 (1907); Berry v. Bourne, 588 F. 2d 422 (4th Cir. 1978); Hayward v. Clay, 573 F. 2d 187 (4th Cir. 1978), cert. denied 439 U.S. 959 (1978); Muller v. Curran, 889 F. 2d 54 (4th Cir. 1989), cert. denied 493 U.S. 1074 (1990). There is no compelling equal protection claim for consideration by this Court.

Even though no one had a right to vote on the City's annexation, the Petitioners contend that the Fourth Circuit should have focused on the entire state instead of the City of Wilmington in deciding their equal protection claim. The Petitioners, however, can not show how a vote by the residents of Holden Beach (Pet., App. C at 128a) or a vote by potential annexees near River Bend (Pet., App. C at

122a) on local annexation decisions is of any interest to the Petitioners residing adjacent to the City of Wilmington. Every federal court that has reviewed a challenge to an annexation where a state's annexation procedures allowed a vote in some cases but not in others, has rejected the Petitioners' argument. See: Morgan v. Florissant, 147 F. 3d 772 (8th Cir. 1998); Jefferson Tp. v. City of West Carrollton, 517 F. Supp. 417 (S.D. Ohio 1981), aff'd, 718 F. 2d 1099 (6th Cir. 1983); Murphy v. Kansas City, 347 F. Supp. 837 (W.D. Mo. 1972); Thompson v. Whitley, 344 F. Supp. 480 (E.D.N.C. 1972) (three-judge panel); Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo. 1970) (three-judge panel), aff'd, 399 U.S. 901 (1970).

Murphy v. Kansas City, 347 F. Supp. 837, was an equal protection challenge to an annexation based in part on the fact that the residents of the area were not permitted to vote while residents of proposed annexation areas in other parts of the state were permitted to vote. The Murphy Court upheld Missouri's annexation laws stating: "It is established law that a state has wide discretion in deciding whether its laws shall operate state wide, or shall operate only in certain areas or shall affect one group of citizens differently from others. [Citations omitted]" Id. at 845. As this Court has held, ". . . the Equal Protection clause relates to equality between persons as such, rather than between areas and . . . territorial uniformity is not a constitutional prerequisite." McGowan v. Maryland, 366 U.S. 420, 427 (1961); Salsburg v. Maryland, 346 U.S. 545 (1954). That North Carolina provides several procedures "by which annexation to a municipal corporation might be had is not violative of any Federal Constitutional doctrine." Jefferson Tp. v. City of West Carrollton, 517 F. Supp. at 420. While annexation may be a matter of general interest to the community, there is no "basis for an equal protection

claim when no one is granted the right to vote on the matter" of annexation. [Citation omitted] Berry v. Bourne, 588 F. 2d at 424. It is only when "the right to vote is established [that] the equal protection clause requires that, in matters of general interest to the community, restriction of the franchise on grounds other than age, citizenship and residence can be tolerated only upon proof that it furthers a compelling state interest." Hayward v. Clay, 573 F. 2d at 190.

The Petitioners take issue with the Fourth Circuit's reliance upon Hunter v. Pittsburgh, 207 U.S. 161, in determining that North Carolina need not "articulate any basis for its annexation decisions." Pet., App. A. at 15a. Hunter, however, recognized that states have broad power in structuring municipalities. As the Hunter Court stated:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them . . .. The number, nature, and duration of powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects,

> the state is supreme, and its legislative body . . . may do as it will, unrestrained by any provision of the Constitution of the United States.

207 U.S. at 178-79. It is absolutely clear that the extension of municipal boundaries is a matter governed by state rather than federal law.

In 1968, this Court stated that Hunter v. Pittsburgh, "continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." Holt Civic Club v. Tuscaloosa, 439 U.S. at 71. As the Holt court stated, "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." Id. It has been stated that Hunter applies principles of federalism that are a central tenet of American constitutionalism. Moorman v. Wood, 504 F. Supp. 467, 471 (E.D. Ky. 1980).

> . . . [A]nnexation . . . is a political question in the sense that under our Constitution's principles of federalism, it is the prerogative of the individual states to resolve the conflicting interests involved in annexation disputes as they see fit. It is true that the prerogative is subject to limitations of equal protection and due process, but Hunter requires that these limitations be interpreted in light of that federalism.

Id. at 473. If the Petitioners' arguments are accepted, the federal courts would become super state legislatures overseeing the manner in which the right to vote is provided

on a multitude of local issues in every state. Such an eventuality would conflict with the principles of federalism set forth in Hunter.

Based on Hunter, the general rule is that challenges to annexations do not generally lie under the Fourteenth Amendment and exceptions to this rule have been recognized only in limited circumstances. A city may not manipulate its boundaries for the purposes of removing voters from the city because of their race. If a state chooses to give residents of an area an opportunity to vote on annexation, that right must be afforded in a manner that comports with equal protection. Raintree Homeowners Association v. Charlotte, 543 F. Supp. 625 (W.D.N.C. 1982), aff'd Baldwin v. City of Winston-Salem, 710 F. 2d 132 (4th Cir. 1983), cert. denied 464 U.S. 1012 (1983). Neither the allegations in the Petitioners' complaints nor the facts will support a Fourteenth Amendment challenge on either of these grounds.

The Fourth Circuit was correct in stating that North Carolina did not need to state a basis for its different methods of annexation. At most the different methods of annexation are subject to rational basis review, and the Petitioners' equal protection claims are insufficient to overcome the presumption of rationality accorded North Carolina's annexation statutes. FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); Heller v. Doe, 509 U.S. 312 (1993). The Fourth Circuit correctly upheld the dismissal of the Petitioners' complaints and its decision does not conflict with any decision of this Court.

II. THE FOURTH CIRCUIT'S DECISION ON ROOKER-FELDMAN DID NOT RENDER ACCESS TO THE FEDERAL COURTS IMPOSSIBLE.

The Petitioners' primary contention is that the Fourth Circuit's decision incorrectly broadened the Rooker-Feldman doctrine. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923). The Fourth Circuit determined that Rooker-Feldman barred suit by all of the Petitioners that were parties to the state court action challenging the City's annexation ("state petitioners"). Pet., App. A at 11a. The Petitioners contend that the state court proceeding only considered the City's compliance with North Carolina law and the claims asserted here are independent of the state claims. The Petitioners also contend that they did not have a reasonable opportunity to present the federal claims in state court "considering North Carolina's bias and judicial history respecting the issue of forcible annexation." Pet. at 15. Although the entire suit should have been dismissed under Rooker-Feldman, the Fourth Circuit's decision as to the state petitioners was correct.

In this case, entertaining the federal claims of the state petitioners would be the equivalent of an appellate review of a state court order that arises out of a particular adjudication. Jordahl v. Democratic Party of Virginia, 122 F. 3d 192, 202 (4th Cir. 1997), cert. denied 522 U.S. 1077 (1998); See also: Feldman, 460 U.S. 462. Rooker-Feldman is implicated "if in order to grant the federal plaintiff the relief sought, the federal court . . . must take action that would render the [state court] judgment ineffectual." [citations and internal quotes omitted]

Jordahl, 122 F. 3d at 202. While Rooker-Feldman does not bar general constitutional challenges to legislative acts, Feldman, 460 U.S. at 479, whenever a plaintiff's federal court complaint is "inextricably intertwined" with a specific state court adjudication, it will not be allowed to proceed as a general challenge. Kirby v. City of Philadelphia, 905 F. Supp. 222 (E.D. Pa. 1995); See also: Jordahl v. Democratic Party of Virginia, 122 F. 3d 192. To determine whether or not a general challenge has been made to a legislative enactment, the courts look to the nature of the relief requested. "Artificial attempts to redefine the relief sought are not sufficient to overcome the requirements of Feldman." Guess v. Board of Medical Examiners, 967 F. 2d 998, 1004 (4th Cir. 1992). Feldman directs the court to undertake a realistic consideration of the nature of the underlying claim. Carbonell v. Louisiana Department of Health and Human Resources, 772 F. 2d 185, 189 (5th Cir. 1985).

Even if the federal claims are not raised in the state court proceedings or not ruled upon, the doctrine will preclude the review of such claims. "[I]f Plaintiffs who lose in state court recast their claims in federal court under the guise of federal constitutional claims that were not raised or decided by the state court, Feldman will preclude jurisdiction if the constitutional claims are inextricably intertwined with the merits of the state court judgment." Guess, 967 F. 2d at 1002. As the Feldman Court stated in an often cited footnote,

> Moreover, the fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District

> Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is imminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. [citations omitted] We also noted in Cardinale that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. [citation omitted]

Feldman, 460 U.S. at 482, note 16. It has also been stated that a claimant cannot avoid Rooker-Feldman by recasting his federal claim as a Section 1983 claim. Jordahl, 122 F. 3d at 202. One inquiry that the courts must make to determine if the constitutional claims are "inextricably intertwined with" questions ruled upon by a state court is whether or not a party had a reasonable opportunity to raise his federal claim in the state proceedings. Brown & Root, Inc. v. Breckenridge, 211 F. 3d 194, 201 (4th Cir. 2000).

When the above standards are applied to the case at bar, Rooker-Feldman is clearly implicated by the state petitioners' complaints in this action and they were correctly dismissed for lack of subject matter jurisdiction. The complaints filed by the Petitioners requested that the

annexation ordinance be declared invalid, null, void and of no effect and that the City be enjoined from enforcing the ordinance. The state petition for review pursuant to N.C. Gen. Stat. §160A-50 (1999) requested the same relief. The New Hanover County Superior Court upheld the annexation ordinance and the state petitioners appealed to the North Carolina Court of Appeals, which affirmed the trial court's decision. Rogers, et. al. v. City of Wilmington, N.C. App. No. COA99-674 (New Hanover Cty. April 18, 2000), Pet., App. E at 130a. The state petitioners then sought discretionary review in the North Carolina Supreme Court which was denied on August 24, 2000. Rogers, et. al. v. City of Wilmington, 352 N.C. 591, 544 S.E. 2d 784 (2000), Pet., App. E at 138a. To grant the relief requested by the state petitioners, the District Court would have been required to take action that rendered the state court judgment ineffectual, and Rooker-Feldman is clearly implicated.

Even though the state petitioners' recast their claims against the annexation under the guise of federal constitutional claims, such claims are inextricably intertwined with the state court judgment and Feldman precludes jurisdiction. Despite the Petitioners' contentions to the contrary, there was a reasonable opportunity to raise the federal claims in the state proceedings. The actual practice of the North Carolina courts has been to consider both federal and state constitutional challenges to the underlying statutes in reviewing annexation ordinances. See: In re Annexation Ordinance (Winston-Salem), 303 N.C. 220, 278 S.E. 2d 224 (1981); In re Annexation Ordinances, 253 N.C. 637, 117 S. E. 2d 795 (1961).

The Petitioners contend that the present action does not seek review of the state court decisions but is a general

constitutional challenge to North Carolina's annexation legislation. Yet, one of the Petitioners' challenges was based on the purported limited review afforded by N.C. Gen. Stat. §160A-50 (2001). Pet., App. A at 17a. This is a direct challenge to the level of review employed by the state court. By not raising their constitutional claims in the state court proceedings, the state petitioners denied the North Carolina courts the opportunity to "give the statute a saving construction in response to those [constitutional] arguments." Feldman, 460 U.S. at 482, note 16.

The state petitioners admit that they specifically declined to bring their constitutional challenges in state court. Pet. at 15-16. Despite what the state petitioners think about the fairness of the North Carolina courts, they are fully competent to adjudicate federal constitutional claims. Id. The state petitioners had the opportunity to bring their federal claims in state court and then petition for a writ of certiorari to review any adverse state judgment. By failing to raise their federal constitutional claims in state court, the state petitioners waived such claims. Id. The decision of the Fourth Circuit dismissing the constitutional claims of the state petitioners under the Rooker-Feldman doctrine was correct.

III. THE FOURTH CIRCUIT'S DECISION ON THE ROOKER-FELDMAN DOCTRINE DID NOT AFFECT ITS DECISION ON THE MERITS.

While the state petitioners were correctly dismissed under Rooker-Feldman, this Court should not consider this issue because it did not affect the Fourth Circuit's determination on the merits. The City contended on appeal for the first time that the Rooker-Feldman doctrine barred

the consideration of the Petitioners' claims. The Fourth Circuit dismissed all of the state petitioners, but considered the claims of approximately eighteen Petitioners that were not parties to the state court proceedings. Pet. App. A at 10a-11a. If any of the remaining Petitioners had prevailed on their claims, then all of the Petitioners would have procured the relief they sought. Thus, even if the Fourth Circuit committed error in its application of Rooker-Feldman, such error did not affect the substantial rights of the state petitioners. Cf. 28 U.S.C. §2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). Therefore, the Rooker-Feldman issue should not be considered by this Court.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

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